

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
July 11, 2006 Session

**DAVID H. THOMPSON, JR. v. TERMINIX INTERNATIONAL
COMPANY, L.P.**

**Direct Appeal from the Circuit Court for Davidson County
No. 05C-2102 Hamilton Gayden, Judge**

No. M2005-02708-COA-R3-CV - Filed on August 16, 2006

The trial court granted Defendant's motion to compel arbitration, determined the parties' agreement was governed by the Federal Arbitration Act, and dismissed Plaintiff's cause of action. Plaintiff appealed. We reverse dismissal of the action and remand for entry of an order staying the matter pending arbitration. The judgment of the trial court is otherwise affirmed.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed in part;
Reversed in part; and Remanded**

DAVID R. FARMER, J., delivered the opinion of the court, in which W. FRANK CRAWFORD, P.J., W.S., and HOLLY M. KIRBY, J., joined.

Michele E. Cooper and Andrew Grams, Nashville, Tennessee, for the appellant, David H. Thompson, Jr.

M. Clark Spoden and Brian C. Neal, Nashville, Tennessee, for the appellee, Terminix International Company, L.P.

OPINION

This dispute arises from an arbitration clause in a contract for termite protection executed by Plaintiff/Appellant David H. Thompson, Jr. (Mr. Thompson) and Defendant Terminix International Company ("Terminix") in July 1992. The agreement included a "termite protection plan" that provided for payment by Terminix for new damages to Mr. Thompson's property and its contents resulting from termite activity subsequent to the contract date. The contract also included an arbitration provision at Paragraph 9.

On July 15, 2005, Mr. Thompson filed a complaint in the Circuit Court for Davidson County alleging that, despite annual inspection of his Nashville property, application of necessary treatments to protect against termites, and annual reports from Terminix indicating no termite problems, in

August or September 2004 he discovered his property was infested with termites when “a twelve foot by twenty foot (12' X 20') room basically fell off the back of his house.” Mr. Thompson alleged “[t]he damage was so extensive that it could only have happened over a substantial length of time, rather than the sixty (60) days from the latest inspection and treatment by Terminix.” Mr. Thompson asserted he immediately notified Terminix of the damage and that, on or about September 4, 2004, Terminix reinspected the property and observed “active tunnels/visible damage to floor joists.” He further asserted that Terminix failed and refused to secure the repairs, and that he hired a contractor to perform the necessary repairs, thereby mitigating damages. In his complaint, Mr. Thompson asserted Terminix had failed to disclose the arbitration clause in the contract and alleged violation of the Tennessee Consumer Protection Act, fraud and misrepresentation, and wrongful concealment. He prayed for damages in excess of \$36,000, treble damages and attorney’s fees under the Tennessee Consumer Protection Act, punitive damages in the amount of \$250,000, and costs. He additionally prayed for a jury to hear the matter.

On September 9, 2005, Terminix filed a motion to compel arbitration and to dismiss. In its motion, Terminix moved the court to refer the dispute to arbitration under the provisions of the Federal Arbitration Act in accordance with Paragraph 9 of the contract, and to dismiss or stay the case pending arbitration. Paragraph 9 provided:

The Purchaser and Terminix agree that any controversy or claim between them arising out of or relating to this agreement shall be settled exclusively by arbitration. Such arbitration shall be conducted in accordance with the Commercial Arbitration Rules then in force of the American Arbitration Association. The decision of the arbitrator shall be a final and binding resolution of the disagreement which may be entered as a judgment by any court of competent jurisdiction. Neither party shall sue the other where the basis of the suit is this agreement other than for enforcement of the arbitrator’s decision.

The trial court heard Terminix’s motion on October 28, 2005. On November 8, 2005, the trial court entered an order finding the dispute was governed by the Federal Arbitration Act (“FAA”), granting Terminix’s motion to compel arbitration, and dismissing the action. In its order, the trial court stated: “[t]he Court grants Plaintiff permission to seek an interlocutory appeal with regard to the Court’s finding that the Federal Arbitration Act governs this dispute.” Mr. Thompson filed a timely notice of appeal to this Court. We affirm the trial court’s determination that the FAA applies to this dispute and the court’s order compelling arbitration. We reverse dismissal of the action, however, and remand for entry of an order staying the matter pending arbitration.

Issues Presented

Mr. Thompson presents the following issues for our review:

1. Whether the trial court correctly applied summary judgment standards and procedures.

2. Whether the Federal Arbitration Act, 9 U.S.C.A. § 2, preempts state law in this transaction.
3. Whether, under the Tennessee Uniform Arbitration Act, Tennessee Code Annotated §§ 29-5-301, et seq., the arbitration clause contained in the contract is enforceable.

Standard of Review

The interpretation of a contract is a matter of law. *Guiliano v. Cleo, Inc.*, 995 S.W.2d 88, 95 (Tenn. 1999). We review the trial court's conclusions on matters of law *de novo*, with no presumption of correctness. Tenn. R. App. P. 13(d); *Bowden v. Ward*, 27 S.W.3d 913, 916 (Tenn. 2000).

The “cardinal rule” of contract construction is to ascertain the intent of the parties and to effectuate that intent consistent with applicable legal principles. *Frizzell Constr. Co. v. Gatlinburg, L.L.C.*, 9 S.W.3d 79, 85 (Tenn. 1999). When the language of the contract is plain and unambiguous, courts determine the intentions of the parties from the four corners of the contract, interpreting and enforcing it as written. *Int’l Flight Ctr. v. City of Murfreesboro*, 45 SW3d 565, 570 (Tenn. Ct. App. 2000). A contract is not rendered ambiguous simply because the parties disagree as to the interpretation of one or more of its provisions. *Id.* at n5. Courts generally apply these “ordinary state-law principles” to determine whether parties agreed to submit disputes to arbitration. *Frizzell*, 9 S.W.3d at 85.

Analysis

Mr. Thompson raises two fundamental issues on appeal: first, whether the arbitration clause contained in the contract is governed by the FAA; second, if the FAA applies, whether it preempts application of the Tennessee Uniform Arbitration Act (“TUAA”), which provides that, for contracts “relating to . . . property and structures utilized as a residence of a party, the clause providing for arbitration shall be additionally signed or initialed by the parties.” Tennessee Code Annotated § 29-5-302(a). Mr. Thompson asserts, as an initial matter, that the trial court essentially awarded summary judgment on this issue where Terminix styled its September 9 motion as a “motion to compel arbitration process and to dismiss” and where the trial court considered matters outside the pleadings in making its determination. Mr. Thompson asserts that, accordingly, we should review the trial court’s determination under the standard of review applicable to summary judgment and remand for further proceedings because a genuine issue of material fact exists with respect to whether the contract involved interstate commerce.

Terminix, on the other hand, asserts its motion was neither a motion to dismiss pursuant to Tennessee Rule of Civil Procedure 12.02(6) nor a motion for summary judgment, but a motion to compel arbitration in accordance with Paragraph 9 of the contract. It contends that the trial court necessarily determined whether the contract was governed by the FAA or the Tennessee Uniform

Arbitration Act (“TUAA”) as a gateway issue necessary to its decision to grant Terminix’s motion to compel arbitration.

In reviewing this matter, we first address the procedural posture from which this appeal arises. Under the FAA, where the trial court orders arbitration and dismisses an action, the order is final and appealable as of right. *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 88 (2000)(construing 9 U.S.C. §16(a)(3), which provides that an appeal may be taken from “a final decision with respect to an arbitration that is subject to this title”).¹ Tennessee Code Annotated § 29-5-319(a)(6)² similarly provides that an appeal may be taken from “[a] judgment or decree entered pursuant to the provisions of this part.” Thus, Mr. Thompson’s appeal arises as an appeal of right under Tennessee Rule of Appellate Procedure 3 where the trial court dismissed the action. Both the FAA and the TUAA, however, provide that, upon granting a party’s motion to compel arbitration, the trial court “shall” stay the action or proceeding involving the issue subject to arbitration. 9 U.S.C. § 3; Tenn. Code Ann. § 29-5-303(d)(2000). The stay may be with respect only to the issue

¹9 U.S.C. § 16 provides:

- (a) An appeal may be taken from--
 - (1) an order--
 - (A) refusing a stay of any action under section 3 of this title,
 - (B) denying a petition under section 4 of this title to order arbitration to proceed,
 - (C) denying an application under section 206 of this title to compel arbitration,
 - (D) confirming or denying confirmation of an award or partial award, or
 - (E) modifying, correcting, or vacating an award;
 - (2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or
 - (3) a final decision with respect to an arbitration that is subject to this title.
- (b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order--
 - (1) granting a stay of any action under section 3 of this title;
 - (2) directing arbitration to proceed under section 4 of this title;
 - (3) compelling arbitration under section 206 of this title; or
 - (4) refusing to enjoin an arbitration that is subject to this title.

² Tennessee Code Annotated § 29-5-319 provides:

- Appeal.** - - (a) An appeal may be taken from:
- (1) An order denying an application to compel arbitration made under § 29-5-303;
 - (2) An order granting an application to stay arbitration made under § 29-5-303(b);
 - (3) An order confirming or denying confirmation of an award;
 - (4) An order modifying or correcting an award;
 - (5) An order vacating an award without directing a re-hearing; and
 - (6) A judgment or decree entered pursuant to the provisions of this part.
- (b) The Appeal shall be taken in the manner and to the same extent as from orders or judgments in a civil action.”

Tenn. Code Ann. § 29-5-319 (2000).

subject to arbitration where other issues are severable. *Id.* This court and at least one federal district court have held that, upon granting a motion to compel arbitration of an issue, the correct procedure in the trial court is to stay the matter pending arbitration and not to dismiss it. *M. R. Dillard Constr. v. J.P. Realty, II, Inc.*, No. M1999-01250-COA-R3-CV, 2000 WL 48497, at *1 (Tenn. Ct. App. Jan. 21, 2000) (*no perm. app. filed*); *Geiger v. Ryan's Family Steak Houses, Inc.*, 134 F.Supp.2d 985, 993 (S.D. Ind. 2001).

Additionally, an order denying a motion to compel arbitration is immediately appealable pursuant to statute. 9 U.S.C. § 16; Tenn. Code Ann. § 29-5-319(a)(1). However, an order granting a motion to compel arbitration and staying the action is not directly appealable. 9 U.S.C. § 16(b); *Green Tree Fin.*, 531 U.S. 79, 87 n.2; Tenn. Code Ann. § 29-5-319 (2000). The correct procedure to be followed by the trial court upon a motion to compel arbitration, therefore, is, if it determines the matter is subject to arbitration, to enter an order compelling arbitration of that matter and staying the matter. Dismissal of the action, although appealable, amounts to an end run around the statute.

Under the TUAA, if the issue subject to arbitration is severable, the court may order the stay with respect to that issue only. Tenn. Code Ann. § 29-5-304(d)(2000). Similarly, under the FAA, the determination of whether issues not subject to arbitration should be stayed lies within the sound discretion of the trial court. Joseph M. Pellicciotti, Annotation, *Construction and Application of Mandatory Stay Provision of Federal Arbitration Act*, 9 U.S.C. § 3, 1 A.L.R. Fed. 2d 557 (2005).

As we have previously observed, when construing a motion, courts look to its substance rather than its form. *E.g., Mitchell v. Owens*, 185 S.W.3d 837, 839 (Tenn. Ct. App. 2005). In this case, although Terminix's motion was styled as a motion to compel arbitration and dismiss, the motion itself seeks dismissal or a stay pending arbitration. Thus, contrary to Mr. Thompson's assertion otherwise, Terminix's motion was not a Rule 12.02 motion to dismiss which was converted to a motion for summary judgment when the trial court considered matters outside the pleadings.

Terminix contends that the trial court's order finding the FAA applicable to this contract should be neither construed nor reviewed under the standard of review applicable to summary judgment, but as a "gateway" matter necessarily within the province of the trial court when considering whether to compel arbitration. Before considering whether the trial court erred in determining this matter was governed by the FAA, therefore, we first must consider whether the determination was, as Terminix asserts, an issue properly decided by the trial court as a gateway matter and not an issue subject to arbitration.

Upon a motion to compel arbitration of an issue and an opposing party's refusal to arbitrate, the trial court must first determine whether the issue is subject to arbitration. *See*, 9 U.S.C. § 3; Tenn. Code Ann. § 29-5-303(a) (2000). Thus, the trial court must determine certain "gateway" issues, including matters "such as whether the parties have a valid arbitration agreement at all or whether a concededly binding arbitration clause applies to a certain type of controversy." *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 452 (2003). Thus, issues within the trial court's duty as gatekeeper are limited to the "validity of the arbitration clause . . . [and] its applicability to the

underlying dispute between the parties.” *Id.* These gateway issues fall within the “certain limited circumstances, [where] courts assume that the parties intended courts, not arbitrators, to decide a particular arbitration-related matter (in the absence of ‘clea[r] and unmistakabl[e]’ evidence to the contrary).” *Id.* (quoting, *AT & T Technologies, Inc. v. Commc’ns Workers*, 475 U.S. 643, 649 (1986)). “These limited instances typically involve matters of a kind that ‘contracting parties would likely have expected a court’ to decide.” *Id.* (quoting, *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83, (2002)). Further, any doubt about the “scope of arbitrable issues” should be resolved “‘in favor of arbitration.’” *Id.* (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985)).

We agree with Terminix that the issue of whether interstate commerce exists is a gateway issue to be decided by the trial court in this case. This issue is necessary to the determination of whether, in the first instance, the FAA or the TUAA applies to this contract. *See Frizzell Constr. Co. v. Gatlinburg, L.L.C.*, 9 S.W.3d 79, (Tenn. 1999)(stating, “we must first decide whether this contract is one ‘evidencing a transaction involving interstate commerce’ before we can decide the proper application of the FAA.”). In the absence of a contractual choice of law provision, the choice of law could be an issue to be decided by arbitration given the broad arbitration clause contained in this contract. *See, Green Tree*, 539 U.S. at 452-53 (holding that whether a contract forbids class arbitration is a matter concerning contract interpretation and arbitration procedures to be decided by the arbitrator where contract provided that all disputes were to be resolved by arbitration). In this case, however, the applicable law question relates to the validity of the arbitration clause where Mr. Thompson asserts the clause is not valid under Tennessee law.

We agree with the trial court’s implicit finding that this contract evidenced a transaction involving interstate commerce. The FAA requires enforcement of written agreements to arbitrate in “a contract evidencing a transaction involving commerce” 9 U.S.C. § 2. The United States Supreme Court has interpreted “involving commerce” broadly, holding that “involving” is the “functional equivalent of ‘affecting.’” *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 273-74 (1995). In *Allied-Bruce*, the Supreme Court held that the FAA applies to arbitration clauses in contracts where interstate commerce is present in fact, regardless of whether it was within the contemplation of the parties. *Id.* at 278.

Terminix submits that it is “multistate [in] nature” where it is composed of multiple partner corporations whose principle places of business are in several states. It further submits that its services and the termite and pest control products it utilizes in fulfillment of its contract with Mr. Thompson are in interstate commerce. Mr. Thompson, on the other hand, contends that the contract was executed and performed exclusively in Tennessee; that Terminix International’s corporate headquarters and principle place of business are in Tennessee; that all Terminix employees sent by Terminix to perform the contract are residents of Tennessee; and that the company used to print Terminix’s forms and warranties is in Tennessee. At the October hearing of Terminix’s motion to compel arbitration, counsel for Mr. Thompson argued that Terminix had not proved that products used in fulfillment of the contract over the twelve-year period had traveled in interstate commerce. Terminix, on the other hand, asserted that, in addition to its multi-state corporate structure and

operations, its products had traveled in interstate commerce. This assertion is supported in the record by the affidavit of Stephen D. Howard, senior vice president and chief financial officer of Terminix International Company.

Mr. Thompson does not dispute the multi-state nature of Terminix, nor does he offer any evidence to support his assertion that Terminix's termite and pest control products were not involved in interstate commerce. Although interstate commerce clearly was not within Mr. Thompson's contemplation when he entered into this contract, in light of the broad application and reach of 9 U.S.C. § 2 prescribed by the Supreme Court in *Allied-Bruce*, we find the record supports a determination that this contract is one evidencing a transaction involving interstate commerce in fact.

We next consider Mr. Thompson's assertion that the TUAA, and not the FAA, should apply to this contract notwithstanding evidence of interstate commerce. Notwithstanding the foregoing, a broad arbitration clause in a contract implicating interstate commerce may be impacted by state law where the parties include a state law choice of law provision in their agreement. *Frizzell Constr. Co. v. Gatlinburg, L.L.C.*, 9 S.W.3d 79, 85-86 (Tenn. 1999). Thus, issues otherwise subject to arbitration under the FAA may be reserved for judicial resolution where the parties have "[chosen] the arbitration law by which they intend to be governed" through a choice of law provision. *Id.* at 86. In the absence of a contractual choice of law provision, however, the FAA is presumed applicable when interstate commerce is present. *Guffy v. Toll Bros. Real Estate, Inc.*, No. M2003-01810-COA-R3-CV, 2004 WL 2412627, at *5 (Tenn. Ct. App. Oct. 27, 2004)(*no perm. app. filed*)(citing *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 278 (1995)).

The contract in this case contains no choice of law provision. As noted above, moreover, we agree with the trial court that this contract evidences a transaction involving interstate commerce. Accordingly, we affirm the trial court's determination that this dispute is governed by the FAA, and that the TUAA is inapplicable. It is therefore unnecessary for us to address whether the provisions of Tennessee Code Annotated § 29-5-302 are in conflict with and preempted by the FAA.

Holding

In light of the foregoing, we reverse the trial court's order of dismissal and remand for entry of an order staying the matter pending arbitration. We affirm the trial court's order granting Terminix's motion to compel arbitration under the FAA. Costs of this appeal are taxed to the Appellant, David H. Thompson, Jr., and his surety, for which execution may issue if necessary.

DAVID R. FARMER, JUDGE